

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 10, 2008 Session

HEATHER RENE SWINEA BREWER v. JERRY WAYNE SWINEA, JR.

**Appeal from the Chancery Court for Wayne County
No. 11575 Jim T. Hamilton, Chancellor**

No. M2007-02448-COA-R3-CV - Filed June 16, 2009

Mother filed a petition to modify residential parenting schedule based on a material change of circumstance. The trial court found a material change of circumstance, named Father primary residential parent and provided that, if Mother relocated, her parenting time would be reduced. We affirm the court's denial of the relief requested in Mother's petition and modify the order of the court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J. joined.

Billy J. Marlowe, Nashville, Tennessee, for the appellant, Heather Rene Swinea Brewer.

William M. Harris, Lawrenceburg, Tennessee, for the appellee, Jerry Wayne Swinea, Jr.,

MEMORANDUM OPINION¹

The parties were divorced in March 2005; the divorce decree adopted a permanent parenting plan that granted Mother and Father substantially equal parenting time with their three year old son. At the time of the divorce Father worked on a river barge, which required him to be away from home on alternating thirty day periods; consequently, the parenting plan alternated parenting time between Mother and Father in thirty day intervals. On March 2, 2007, Mother filed a petition alleging that

¹ Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

there had been a material change of circumstances and seeking primary custody of their son;² the change of circumstance was alleged to be “the mother, the petitioner, has met and fallen in love with a fine man who lives in Franklin, Tennessee.” Father answered the petition, denying that there had been a material change of circumstances.

Eight days before the hearing on the petition, Father filed a counter-petition, again denying a material change of circumstances, but asserting that if the Court should find “there has been a material change of circumstances that it is in the best interest of the minor child that the Counter-Petitioner/Father should be named primary residential parent.” On the day of the hearing, Mother filed a motion to dismiss the counter-petition, asserting that the counter-petition was in fact an amendment to Father’s answer for which leave of court had not been sought and that Mother would be unduly prejudiced in having to defend the counter-petition on the day of the hearing. The trial court denied the motion to dismiss.

Following a hearing, the court entered an order finding, *inter alia*, the following:

The court finds that the mother’s testimony is less than credible. She filed this Petition after briefly dating Mr. Brewer, then married him before the petition could be heard. She has made no definitive plans to move or provide for her child after the proposed move. Mr. Brewer testified that his wife intends to remain in Wayne County, if her petition is not granted. The Court is of the opinion that the mother exhibits instability and her uncertainty and indecisiveness constitutes a material change of circumstances and finds that the child’s best interest is not the mother’s primary concern.

The court named Father as primary residential parent and stated that, as long as Mother continued to reside in Wayne County, she would alternate residential parenting time with Father. The order also provided that, if Mother relocated to Williamson County, she would have parenting time every other weekend with child support being set.

Mother appeals, asserting the following issues:

1. Whether the trial court erred in overruling Mother’s Motion to Dismiss Father’s Counter-Petition and Proposed Permanent Parenting Plan filed, without leave of court, eight (8) days prior to the final hearing in this matter.
2. Whether the trial court abused its discretion in applying an incorrect legal standard with respect to its finding a material change of circumstances that warranted naming Father the primary residential parent.

² The original petition sought to have the court appoint a mediator and gave notice of a hearing on May 7 to request the appointment of a mediator; the record does not reflect what, if any, action was taken on this request.

I. Standard of Review

Review of the trial court's findings of fact is *de novo* upon the record accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(b); *Kaplan v. Bugalla*, 199 S.W.3d 632, 635 (Tenn. 2006). Review of the trial court's conclusions of law is *de novo* with no presumption of correctness afforded to the trial court's decision. *See Kaplan*, 199 S.W.3d at 635.

II. Discussion

A. The Consideration of Father's Counter-Petition

Mother complains that Father's counter-petition was, in effect, an amendment to his answer, filed eight days prior to the hearing and without leave of court in violation of the provisions of Tenn. R. Civ. P. 15.01. Mother contends that the court's decision to overrule her motion to dismiss the counter-petition and allow the counter-petition to be heard was "pivotal" inasmuch as her petition sought to modify the residential parenting schedule pursuant to Tenn. Code Ann. § 36-6-101(a)(2)(C) based on a material change of circumstance; consequently, if the court determined that there was not a material change of circumstance, the petition would have been dismissed. The action of the court in considering the counter-petition, she asserts, allowed the court to "change[d] primary residential parents which required its finding a material change of circumstance different than that required to modify the residential parenting schedule."

The record shows that Mother's petition was filed on March 2, 2007; depositions of the parties were taken on June 29; Father's answer was filed on July 16; Mother's proposed parenting plan filed on July 25; Father's counter-petition was filed on August 14. Father's answer to the petition, *inter alia*, denied there had been a material change of circumstances and the counter-petition contained the following statement:

The Counter-Petitioner/Father would further show the Court that the Petitioner/Mother alleges there has been a material change of circumstance.

The Counter-Petitioner/Father denies there has been a material change of circumstance and avers that if the Court should find there has been a material change of circumstance that it is in the best interest of the minor child that the Counter-Petitioner/Father should be named the primary residential parent.

Father included in his prayer for relief the following:

That the Court find that there has been no material change of circumstance or in the alternative, that the Counter-Petitioner/Father be declared the primary residential parent and adopt the Permanent Parenting Plan attached hereto.

When Mother's motion to dismiss the counter-petition was presented at the hearing of the pre-trial motions, Father's counsel acknowledged that he did not seek leave of court and should have done so and stated further:

. . . we filed an answer. We did not file a counter claim with it simply because, under our law, if the Court finds there's no material change, things stay as they are.

If the Court finds that there is a material change, then the court goes to the best-interest trigger; and if the Court finds it's in the best interest that things stay as they are, they stay as they are.

If the Court finds it's in the best interest that the child should live full time with the mother, so be it, but the Court could also find under the best-interest trigger that the child would live with the father.

So out of an abundance of caution, I did last week discover that my client could, if necessary, move from his job and be full time here in--he would come off the river--he works 30 days on and 30 days off or 27 and 27--that he would come off the river and go to other jobs and live here.

We just discovered that; but that was last week, and [Mother's counsel] was made aware of that last Friday.

After hearing counsel for the parties, the court overruled the motion, stating "[t]his case needs to be tried. I'm going to overrule your motion. I don't see anything unusual in the counter petition, so lets go ahead."

The decision of whether to allow an amendment is a discretionary one and the provision of Tenn. R. Civ. P. 15.01 that leave to amend "shall be freely given when justice so requires" is a mandate to be heeded that lessens the exercise of discretion on the part of the trial court. *See Branch v. Warren*, 527 S.W.2d 89, 91 (Tenn. 1975). Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made" and the court abuses its discretion only when it "applie[s] an incorrect legal standard, or reach[es] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (internal quotations omitted). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Id.*

Measured against this standard we cannot say that the court abused its discretion in allowing the case to proceed with consideration of the counter-petition for the stated purposes, i.e., to allow the trial court to consider naming Father primary residential parent in the event the court found a change of circumstances. Father's Counsel's explanation of the reason the counter-petition was not filed earlier was accepted by the court and is not unreasonable or contrived. The court determined that no prejudice would inure to Mother by allowing the court to consider the counter-petition which, in substantial part, reflected the assertions in Father's answer to the petition, in the course of the court's determination of the issues raised in her petition. The question of whether Mother was

prejudiced by the court's consideration of the counter-petition is more appropriately addressed as part of our disposition of the second issue presented in this appeal.

B. The Change in the Prior Decree

In its disposition of the petition, the trial court concluded as follows:

That the mother's desire to move to Williamson County, Tennessee, her instability, uncertainty and indecisiveness constitutes a material change of circumstances and is enough to warrant the Court's consideration to modify the permanent parenting plan filed on the 11th day of March 2005³ as follows:

The court finds it is in the child's best interest that the respondent, Jerry Wayne Swinea, Jr., be named as the Primary Residential Parent and it is in the minor child's best interest that he continue to reside in and attend public school in Wayne County, Tennessee.

In the event the mother decides to relocate to Williamson County to live with her current husband . . . the Court will adopt a standard every other weekend visitation schedule with alternating holidays for the mother and child support will be set based on the Tennessee Child Support Guidelines for Income Shares.

Mother contends that the trial court erred in applying the legal standard set forth in Tenn. Code Ann. § 36-6-101(a)(2)(B), applicable to proposed modifications of a custody decree, rather than that contained at Tenn. Code Ann. § 36-6-101(a)(2)(C), applicable to proposed modifications of a parenting schedule, in its determination of whether there was a material change of circumstances. As a result, she contends, she has been "wrongfully stripped of her decision making and primary parenting responsibilities."

We do not agree that the court's order goes as far as Mother argues. Contrary to Mother's insistence, we have found nothing in the record to indicate that she had "decision making and primary parenting responsibilities;" rather, the record reflects that a primary residential parent was not named in the March 2005 decree. In its order on her petition, the court did not make a custody determination such as to invoke Tenn. Code Ann. § 36-6-101(a)(2)(B) or a change in the parenting schedule such as to invoke § 36-6-101(a)(2)(C). Rather, the order designated Father as primary residential parent and found that it was in the best interest of the child to remain in Wayne County; the other provisions of the existing parenting plan, including the amount of residential parenting time

³ The March 2005 plan is not included in the record on appeal, although the court's order disposing of Mother's petition incorporates portions of the original parenting plan. A primary residential parent was not named in the March 2005 plan.

for each parent, remain in effect.⁴ In so doing the court denied Mother's request to modify the existing residential schedule and rejected Father's proposed parenting plan. Tenn. Code Ann. § 36-6-402 (5) mandates that the trial court designate one party as the primary residential parent, *see Eastman v. Eastman*, 2007 WL 1227042 at *5 (Tenn. Ct. App. Apr. 25, 2007), and the court did not err, based on the proof presented, in designating Father as primary residential parent and finding that it was in the best interest of the child to remain in Wayne County, where both parents and members of their families resided and where he was enrolled in school. *See Hopkins v. Hopkins*, 152 S.W.3d 447 (Tenn. 2004).

Consequently, we affirm the denial of Mother's petition to modify the residential parenting schedule and the designation of Father as primary residential parent.⁵ In so doing, we make no determination of whether a change of circumstance such as to authorize relief under either Tenn. Code Ann. § 36-6-101(a)(2)(B) or (C) would be appropriate under this record.

We modify the order by vacating the court's determination of the parenting time Mother would have if she relocates to Williamson County; the court should address the effect of Mother's move on her parenting time at such time that she has moved and seeks modification of the existing residential parenting schedule.

III. Conclusion

For the reasons set forth above, we affirm the judgment of the Chancery Court, as modified. Costs are assessed against Mother.

RICHARD H. DINKINS, JUDGE

⁴ In recognition of Father's work schedule, the March 2005 parenting plan provided that Mother would be responsible for the child during the 30 days that Father was away and that Father would be responsible for the child during the thirty days that he was off work. The order from which the instant appeal was taken provides that Mother and Father would have parenting time on a rotating basis, based on Father's work schedule, with Father to have parenting time any time he was not away working and Mother to have parenting time any time he was. Both orders retained residential sharing time for the paternal grandparents.

⁵ Although the record reflects that Mother filed a proposed parenting plan on July 25, 2007, the plan is not included in the record. Father's proposed plan was filed along with his counter-petition on August 14.